ILLINOIS POLLUTION CONTROL BOARD
June 15, 1992

GALLATIN NATIONAL COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB 91-256
v.	)	(Landfill Siting Review)
	)	
THE FULTON COUNTY BOARD and THE COUNTY OF FULTON,	)	
	)	
Respondents.	)	

DISSENTING OPINION (by J. Anderson and M. Nardulli):

We disagree with the majority's decision not to support what we believe is the appropriate outcome, namely, reversal of the Fulton County Board's grant of siting approval as being fundamentally unfair.[1] We emphasize that our dissent is based upon the actions of the Fulton County Board, as expressed in a series of formal policy decisions.

We appreciate Fulton County's desire to generate revenue from a landfill expansion rather than impose a tax directly to deal with its compliance problems with existing Landfill No. 2. However, Section 39.2 of the Environmental Protection Act (Act), Ill.Rev.Stat. 1991, ch. 111½, par. 1039.2, or SB 172, as the process is more commonly referred to, places constraints on a county's power to implement such decisions simply as a matter of policy. We believe that, if there is to be any meaning given to the question of fundamental fairness regarding pre-commitment in the quasi-judicial SB 172 process, it should be given in this case.

The Fulton County Board already concluded on June 12, 1990, that the expansion was necessary when it rejected two other options and decided to proceed with Option 3 (i.e., the landfill expansion.) This decision was subject to two preconditions: 1) obtaining financing and 2) obtaining siting approval. There was no back-up option. These conditions were not pre-conditions in the usual sense of the term, however. Rather, the two conditions were "implementing conditions" that were necessary to effectuate the Fulton County Board's decision. The Fulton County Board affirmed its conclusion when it expressly passed, and utilized monies from, the bond ordinance for the sole purpose of expanding Landfill No. 2. In fact, the Fulton County Board stated in the

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[1]At this Board's June 4, 1992 meeting, a motion to adopt such an outcome was defeated by a 4-3 vote. However, one Board Member, who voted in the minority, was not present at the June 15, 1992 Board meeting where the 4-2 majority vote was taken.

bond ordinance that "it is necessary and advisable to improve, extend and satisfy existing E.P.A. regulatory requirements of the sanitary landfill facility in the Fulton County Board". (C0870.)

In addition to the above, the following facts also show that the Fulton County Board was predisposed to grant siting approval and had, for all intents and purposes, committed itself to doing so. First, the Fulton County Board had to pledge the future receipts of the proposed expansion as collateral for the bond ordinance. The Fulton County Board only pledged the sales tax intercept revenue as security for the bond obligation at the insistence of the Illinois Rural Bond Bank which, in turn, gave Fulton County further incentive to commit to expanding the landfill. The fact that the Fulton County Board then issued the bonds before the siting hearing and used some of the proceeds from the bond issue to pay the engineers for drawing up the expansion plans and the attorneys for their services at hearing also show a predisposition on the Fulton County Board's part. (Tr. I 121.)

Importantly, the expansion was viewed to have been the only way to correct problems at Landfill No. 2. Fulton County attempted to secure a supplemental permit from the Illinois Environmental Protection Agency (Agency) for the overfilling of Area 1, the elimination of Areas 6, 7, and 8, and for a change in grade for the final grading plan, but was advised by the Agency that it would need to go through a siting process pursuant to Section 39.2 of the Act. (C0037, C0842-0849, C1454.) Because sufficient revenue was not being generated by Landfill No. 2, the expansion and the associated bond issuance was the only way to fund the remediation. (C1267-1268.)

We also do not agree with the majority's belief that the cases of Woodsmoke Resorts, Inc. v. City of Marseilles (3d Dist. 1988), 174 Ill.App.3d 96, 529 N.E.2d 274, and Fairview Area Citizens Taskforce v. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 555 N.E.2d 1178, 1184 are applicable in this instance. Those cases are distinguishable from this case in that the decision-maker in those cases was not the applicant.

In fact, contrary to the majority's view, the supreme court's opinion in E&E Hauling v. IPCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2d Dist. 1983), aff'd in part 107 Ill.2d 33, 481 N.E.2d 664, certainly does not prevent and, we believe, implicitly supports a finding of fundamental unfairness in this instance. The facts of that case are as follows:

On September 10, 1981, E&E Hauling and the DuPage County Forest Preserve District applied to the Agency for permission to expand and modify a landfill. On October 27, 1981, the DuPage County Board passed an ordinance approving the proposed modification and expansion. The Agency had scheduled a public

hearing on the permit application for November 18, 1981. It was at this juncture that the General Assembly amended the Act, effective November 12, 1981, to transfer the power for regional pollution control facility siting approval from the Agency to the local governing body. The effect of the General Assembly's action was the postponement of any Agency permit issuance until the DuPage County Board approved the siting. The DuPage County Board held a hearing on February 1, 1982, and voted to grant siting approval on April 27, 1982. On June 1, 1982 the Village of Hanover Park filed a petition for review of the DuPage county Board's decision with this Board.

This Board reversed the DuPage County Board's decision. In essence, we found that the proceedings were fundamentally unfair in that the DuPage County Board, whose members were also commissioners of the co-applicant District, had already passed favorable judgment on the application before the hearing had begun, and therefore the DuPage County Board was not a proper tribunal. Village of Hanover Park v. County Board of DuPage et al., PCB 82-69, (August 30, 1982 and September 2, 1982), PCB 82-69, 48 PCB 35 and 48 PCB 95. In reversing this Board, the appellate court agreed with the Board's finding of fundamental unfairness; however, the appellate court found that the Board erred in reversing on that basis. Rather, it found, under the rule of necessity, that the DuPage County Board properly heard petitioners' application even though suffering from otherwise disqualifying biases and conflicts of interest. E&E Hauling, 451 N.E.2d at 556, 567.

The supreme court agreed with the appellate court's conclusion that the Board erred in disqualifying the DuPage County Board, but found the appellate court's reasoning to be erroneous. The supreme court stated:

> ...the ordinances were simply a preliminary to the submission of the question of a permit to the Agency. Subsequently, the Act was amended and the [County] Board was charged with the responsibility of deciding whether to approve the landfill's expansion. The [County] Board was required to find that the six standards for approval under the amended act were satisfied. It cannot be said that the board prejudged the adjudicative facts, i.e., the six criteria. (emphasis added)
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> E&E Hauling, 481 N.E.2d at 668.

The supreme court's conclusion in E&E Hauling turned on the fact that the siting authority rested with the Agency at the time the DuPage County Board passed the ordinances. The supreme court concluded that the ordinances were simply a preliminary step in the siting review process because the DuPage County Board could

not have foreseen at the time that it passed the ordinances that the General Assembly would amend the Act "in mid-stream" to give local decision-making bodies SB 172 siting authority. The supreme court's reasoning hardly suggests that it might have reached the same conclusion if the DuPage County Board had been the decision-maker at the time that it approved the ordinances. In this instance, the power to approve Fulton County's siting application always rested with the Fulton County Board. As a result, the sequence of the Fulton County Board's actions must be examined in light of the fact that the Fulton County Board knew that it was responsible for making the siting decision even before Fulton County filed its siting application.

In fact, on June 12, 1990, 13 months before Fulton County filed its siting application, the Fulton County Board concluded that the expansion was necessary and specifically cited the necessity for the SB 172 approval. Then, on November 13, 1990, eight months before Fulton County filed its siting application, the Fulton County Board affirmed its conclusion when it passed the bond ordinance to build the expansion to get the revenues to implement already-chosen Option 3. By coming to such a conclusion prior to the siting hearing, we conclude that the Fulton County Board unacceptably predetermined the outcome of the siting hearing and that, as a result, the siting proceeding was fundamentally unfair.

We reject the notion that our position would have any bearing on the question of what preliminary steps might be taken by a county as related to its solid waste management plan.[2] In fact, such a notion is not relevant here because Fulton County is not expected to complete its plan until 1995. (C1192.) Rather, Fulton County's desire to clean up pollution at the existing site is the focus in this case, not county-wide management issues.

We also reject the notion that our position implies that a county cannot take notice of anticipated revenues. The problem in this case, as the record makes clear, is that this was Fulton County's only consideration. The other two options, to immediately close the landfill operation or to close the landfill operation in the near future, were rejected precisely because they would generate insufficient or no revenue to correct the problems at existing Landfill No. 2 so that it would be in compliance with the Board's landfill regulations. When defending its approval of Criterion 1, the "need" criterion, Fulton County and the Fulton County Board tried to discount any coercive impact on the Fulton County Board's siting decision by arguing that if siting were denied there would be no significant financial

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[2]Consistency with an adopted solid waste management plan became an SB 172 consideration when it was added as Criterion 8 in Section 39.2 of the Act.

repercussions, indeed that the repercussions would be less, in that the proceeds from the bond issue (presumably those not already spent), could be repaid to the bank to satisfy the bond obligation. (Resp. Br. pp. 23, 24.) The reality of the situation dictates otherwise. Even if one were to assume that there would be no financial difficulty regarding the bond issue, the fact is that the loss of the use of the bond monies would re-create the same severe financial and compliance problems the bond monies were supposed to cure; it would place the county back to square one. Fulton County has never had to levy a tax to finance its landfill operations and was faced with a serious noncompliance situation that could force Landfill No. 2 into closure without sufficient monies to pay the costs involved to do it properly. Long before the SB 172 proceeding, the Fulton County Board had determined to continue operating Landfill No. 2 and to cure the problem of insufficient tipping fees by expanding the landfill. In terms of its commitment to this course of action, we assert that this issue was decided at the outset when Option 3 was chosen.

In terms of protecting its revenue source and the question of predisposition, we are particularly struck by Fulton County's and the Fulton County Board's argument in defending the Fulton County Board's "SB 172" decision on Criterion 1: that legally and historically (20 years of operations) it has a mandated service area and a right to require that all solid waste generated be delivered to its landfill, to the exclusion of any newcomers. (Resp.Br. pp. 26-31) In support of its argument, Fulton County and the Fulton County Board, base their legal right on the statutory authority language that the Fulton County Board relied on when it issued the bonds (i.e., Section 5-1047 of the County Code, Ill.Rev.Stat. 1991, ch. 34, par. 5-1047). (Resp. Br. p. 27). The language relied upon provides:

> In order to secure repayment of revenue bonds issued to finance regional pollution control facilities, to further this state's policies and purposes, to advance the public purposes served by resource recovery, and to authorize the implementation of those solid waste management policies, [sic] counties deemed in the public interest, any county which has prepared a solid waste management plan...shall have the authority to require by ordinance, license, contract or other means that all or any portion of solid waste, garbage, refuse and ashes, generated within the unincorporated areas of a county be delivered to a regional pollution control facility designated by the county Board or a transfer station serving such facility for treatment or disposal of such material. Such ordinance, license, contract or other means may be utilized by a county to insure a constant flow of solid waste to the facility notwithstanding the fact that competition may be

displaced or that such measures have an anti-competitive effect....[3]

Arguments that the Fulton County Board had no predisposition to approve the siting require one to ignore the reality of the situation. We have already addressed some pre-commitment issues in the record raised in relation to Criterion 1. The Fulton County Board's views in upholding Criterion 1 (i.e., that "the facility is necessary to accommodate the waste needs of the area it is intended to serve") particularly reflects its predisposition to approve the expansion of Landfill No. 2 for revenue. In our view, the record on the question of need supports this conclusion.

Taken together there was no other consideration, at least no other proper consideration, and certainly not from a quasi-judicial perspective, regarding need. This Board has been cautioned about undue deference to the local decision-maker. Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board et al., No. 91-0144, (1st Dist. March 19, 1992).

Mr. Spencer himself testified that the real reason he believed Landfill No. 3 was necessary was to provide a revenue stream to correct problems of Landfill No. 2. (C1267-1268; C1305-1306.)

As Gallatin correctly points out, Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 554 N.E.2d 1176 and A.R.F. Landfill, Inc. v. Pollution Control Board (2d Dist. 1988) 174 Ill.App.3d 82, 528 N.E.2d 390 stand for the proposition that future development of other disposal sites must be considered in determining need. (See also Waste Management of Illinois, Inc. v. Illinois Pollution Control Board (3rd Dist. 1984), 122 Ill.App.3d 639, 461 N.E.2d 542 and Waste Management of Illinois, Inc. v. Illinois Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E.2d 682.) Accordingly, the fact that a permit had been issued to Gallatin's facility should have been considered.[4]

Finally, given Fulton County's claims of monopoly rights, which the majority had no problem with, we find particularly ironic the majority's belief that the legislature, in requiring local decision-makers to consider the waste needs of the intended

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[3]We note that the language above appears to rely on the county having a prepared solid waste management plan.

[4]We also note that the Board's new landfill regulations consolidate both the development and operating aspects for review before a permit can be issued.

service area, did not intend to establish de facto monopolies. In any event, this is not a valid consideration under the criteria. Moreover, whatever the legislative intent might have been when SB 172 was initially adopted, the subsequent addition of Criterion 8 certainly suggests that de facto monopolies could often result. We suggest that a review of the two Acts identified in Criterion 8 (i.e., the Local Solid Waste Disposal Act and the Solid Waste Planning and Recycling Act) will support this. We note that counties are required to adopt solid waste management plans, and SB 172 considerations must defer to those plans.

In summary, the Fulton County Board's initial decision to formally select the expansion of Landfill No. 2 as the chosen option to get revenues to cure its considerable landfill problems, its implementation of its decision by first issuing bonds dedicated solely to financing the landfill expansion, and then, at the end, its decision to give siting approval, all form an unbroken loop. The Fulton County Board's post-commitment to site the landfill validated the terms of the bond issue which, in turn, allowed the bond monies to continue to be used to generate the revenues pre-committed to solve the landfill problems. The pre-commitment was manifest throughout. When the time came to consider the criteria, it was a ministerial act. We note that Fulton County had already been frustrated by the Agency's refusal to consider granting a permit to expand absent siting approval. Expansion concerns expressed centered on whether enough revenue would be generated with the expansion option; however, this issue was decided when the expansion option was chosen at the outset.

We understand the discomfort over dealing with the awkward situation created under SB 172 when a local government decision-maker has to judge the merits of siting its own proposed facility. However, we reject the view that the legislature never intended this situation. First, county and municipal landfills were common when SB 172 was adopted eleven years ago, as they are today. Second, the dilemma came to a head immediately in E&E Hauling and the legislature has yet to change the situation.

It is for these reasons we believe that the Fulton County Board's grant of siting approval to Fulton County was fundamentally unfair and should have been reversed. In fact, if the circumstances of this case do not constitute predisposition sufficient to give rise to fundamental unfairness, we cannot imagine what circumstances would be sufficient for the Board to make a finding of fundamental unfairness.

We therefore respectfully dissent.

Joan G. Anderson

Michael L. Nardulli

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the 6th day of July, 1992.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board